THOO TEIK YOKE & ANOR.

v.

FOOK CHEONG LOONG CONST. CO. SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. F. 22-316-86]
3 SEPTEMBER 1987

CIVIL PROCEDURE: *Final Judgment - Application for final judgment - Plaintiffs did not state in affidavit they "believe there is no defence to action" - Whether plaintiffs' application defective.*

CIVIL PROCEDURE: *Injunction - Interim mandatory injunction - Whether available on the facts.*

This was case in reference to a sale/purchase agreement dated 30 November 1982 entered into between the plaintiffs/purchasers and the 1st defendants/housing developers. The plaintiffs agreed to purchase a housing lot with a dwelling house to be built by the 1st defendants for a sum of RM95,000.

However the 1st defendants did not complete the dwelling house and deliver vacant possession to the plaintiffs as agreed within 24 calendar months. The house was only completed after a delay of 13½ months for which the plaintiffs were entitled, under the agreement, to claim liquidated damages calculated from day to day at the rate of 10% per annum of the purchase price. Hence the suit.

Held:

[1] It is not enough for the plaintiffs to merely aver generally to such a defence in their pleadings. The plaintiffs must, in no uncertain terms, categorically state their belief that the 1st defendants have no defence to the action.

[2] Since the plaintiff's affidavit has omitted to state so the Court ruled that the affidavit is defective and that the plaintiffs cannot proceed on their application for final judgment under O. 81 r. 1 of the Rules of the High Court 1980.

[3] This was not an appropriate case for which an interim mandatory injunction should lie as damages would be an adequate remedy.

[Plaintiffs' application dismissed with costs.]

Case referred to:
Tan Tik Sing v. Gomez Development Co. Sdn. Bhd. [1979] 2 MLJ 78

Legislation referred to:
Rules of the Supreme Court 1957, O. 14A, O. 81 rr. 1, 2(2)

For the plaintiffs - Anthony John Dason; M/s Dason Co.
For the 1st defendant - Foo Yet Ngo; M/s. Shearn Delamore & Co.
For the 2nd defendants - Rabin Devadason; M/s. Skrine & Co.

JUDGMENT

Siti Norma Yaakob J:

Before me the plaintiffs applied under O. 81 r. 1, to enter final judgment against the first defendants but by way of a preliminary objection, the first defendants submitted that the plaintiffs affidavit in support of the application is defective as it does not state the plaintiffs' belief that there is no defence to the action, a mandatory requirement under O. 81 r. 2(1). Whilst conceding to this submission of the law, the plaintiffs, however, maintain that they had fulfilled such a requirement by pleading in para. 4 of their affidavit, their belief that the first defendants have no legal right to terminate the sale and purchase agreement entered between them and for which the plaintiffs now seek specific performance.

Following the decision in *Tan Tik Sing v. Gomez Development Co. Sdn. Bhd.* [1979] 2 MLJ 78 which dealt with the same objection in an application under O. 14A of the 1957 Supreme Court Rules, which is similar to the present O. 81 r. 1, I consider that it is not enough for the plaintiffs to merely aver generally to such a defence in their pleadings. They must, in no uncertain terms categorically state their belief that the first defendants have no defence to the action and since their affidavit has omitted to state so, I had ruled that the affidavit is defective and that they cannot proceed on their application for final judgment under O. 81 r. 1.

That left the plaintiffs with their alternative prayer in the application that the first defendants deliver vacant possession of the property they had purchased from the first defendants pursuant to the sale and purchase agreement dated 30 November 1982. Although the application had not expressly stated so, this alternative prayer is nothing more than a prayer for an interim mandatory injunction and the law for the granting of such an injunction is already well settled i.e. although the Court has jurisdiction to grant such an injunction, it can only do so in rare and exceptional cases.

To determine this, let me now examine the facts of this case. On 30 November 1982, the plaintiffs entered into a sale and purchase agreement with the first defendants, who are housing developers, to purchase a housing lot with a dwelling house to be build by the latter for a consideration of RM95,000. To finance the purchase of this property, the second defendants granted a housing loan to the plaintiffs and the disbursements of the loan by the second defendants were in accordance with the schedule of payments described in the third schedule of the agreement.

Under Clause 18(i) of the agreement, the first defendants shall complete the dwelling house and deliver vacant possession to the plaintiffs within 24 calendar months from the date of the agreement i.e. on or before 29 November 1984. However, the first defendants were only able to do so on 17 December 1985, a delay of 13½ months for which the plaintiffs are entitled to claim liquidated damages calculated from day to day at the rate of 10% per annum of the purchase price under Clause 18(ii). The plaintiffs, however, by letter dated 3 January 1986, refused to accept vacant possession on the ground that the certificate of fitness had not been issued. Hence, the present application for vacant possession although it is not clear as to whether the certificate of fitness has since been issued.

Together with their notice dated 17 December 1985 to the plaintiffs to take delivery of vacant possession, the first defendants also demanded from the plaintiffs the final payment of RM19,000, representing the last 20% of the balance of the purchase price of which RM14,250 was to be paid by the plaintiffs directly to the first defendants and the balance of RM4,750 to the 3rd defendants, solicitors acting for both the plaintiffs and the first defendants, as stakeholders. A similar letter of demand was also sent to the second defendants.

Under Clause 9(ii), the plaintiffs had 28 days from the date of demand, to make payment and when no such payment was received by the first defendants, they sent another notice dated 15 January 1986, giving the plaintiffs 14 days within which to pay up, failing which, they will treat the agreement as having been repudiated. This notice was first of all sent to the plaintiffs at an address in Jalan Shaw, which the first defendants maintained had been notified by the plaintiffs as being their new address. The notice was however returned undelivered by the postal authorities and the first defendants redirected the same notice to the plaintiffs at the old address given in the agreement. After the expiry of the 14 days when no payment was received from the plaintiffs, the first defendants sent a notice dated 5 February 1986, terminating the agreement. This notice, by way of A.R. registered, was again sent to the plaintiffs' new address but when it was returned undelivered on 13 February 1986, the first defendants redirected the same notice to the plaintiffs by ordinary post, the same day, to the old address and a carbon copy was sent to the plaintiffs' solicitors. A similar notice dated 14 February 1986 was also sent by A.R. registered to the plaintiffs at the old address.

It is not disputed that the final payment of RM19,000 was only made by the second defendants on 13 February 1986 which the first defendants refused to accept as by that time, they had already treated the agreement as having been terminated due to the late payment of the final instalment. The plaintiffs concede to this delay but blame it on the second defendants whose responsibility it was to ensure that payment was duly made on the due date. The second defendants on their part have pleaded that the delay was due to the plaintiffs' failure to comply with all the conditions of the housing loan to enable them to make the final payment on time.

The plaintiffs have also submitted that consideration be given to the hardship caused to them by the first defendants' refusal to deliver vacant possession as they have been deprived of the rentals of the house and that they are liable to pay interest on the loan obtained from the second defendants. In this respect, the plaintiffs' behaviour is not without blame. There is evidence that vacant possession was offered to them as long ago as 17 December 1985 when the house was completed. The plaintiffs chose then not to accept delivery on the grounds that the certificate of fitness had not been issued. They have also admitted that they had delayed in setting the final payment, thereby entitling the first defendants to treat the agreement as having been terminated under Clause 9(ii) of the agreement. It is not enough for the plaintiffs to throw the blame on the second defendants with whom the first defendants are not contractually bound as the first defendants looked upon the plaintiffs to make payments on time.

As for the hardship caused to them, as long as the loan remained unpaid, with or without vacant possession, the plaintiffs are still bound to pay the interests due on the loan they had obtained from the second defendants. As for the loss of rentals, this can easily be compensated by damages and from the circumstances of this particular case, I hardly considered that this is an appropriate case for which an interim mandatory injunction should lie as damages would be an adequate remedy and on that finding, I had dismissed the plaintiffs' application, for vacant possession, against the first defendants, with costs.

Also found at [1987] 2 CLJ 340